REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT KAKAMEGA

CRIMINAL CASE NO. 147 OF 2010

CHARLES MULAMA.....1ST APPELLANT

GIDEON ICHELA MULAMA.....2ND APPELLANT

VERSUS

REPUBLC.....RESPONDENT

(appeal arising from the original conviction and sentence in Kakamega CMC's court

Criminal case no. 440 of 2009 P.O. Ooko, RM, delivered on 8th July,2010)

J U D G M E N T

1. The two appellants were charged in count 1 with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on the 27th day of February 2009 at Ituhubu village , Lukose sublocation, Mrimbuli location, in Kakamega East District within western province, they unlawfully assaulted Monicah Awinja (herein referred to as the complainant) thereby occasioning her actual bodily harm.

The 2nd appellant herein was found guilty of the said charge and sentenced to a fine of Kshs. 20,000/= in default to serve three years imprisonment. The 2nd appellant was acquitted of the charge.

2. In count 2, the two appellants were faced with a charge of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the charge were that on the 14th day of February,2009 at the same place as in count 1 they wilfully and unlawfully maliciously damaged the house of the above said complainant valued at Kshs. 50,000/=. They were found guilty of the charge and each of them was fined Kshs. 20,000/= in default to serve 3 years imprisonment. The appellants were dissatisfied with the judgment of the lower court and filed this appeal in which they raised the following grounds:

1. That the learned trial magistrate erred in not finding that there was no case for the appellants to answer.

2. That the learned trial magistrate erred by convicting the appellants in the light of material conflicts evident in the evidence adduced by key prosecution witnesses.

3. That the learned trial magistrate erred by shifting the burden of proof to the appellants.

4. That the learned trial magistrate erred by ignoring the appellants' defences.

5. That the learned trial magistrate erred by handing down upon the appellants erroneous sentences.

3. The prosecution called 6 witnesses. The evidence of the complainant was that the two appellants are her step sons. That on the 14/2/2009 at 6 am she was sleeping in her house when the two appellants went to the house. They broke down the rear doors to the house. She escaped and left them there. They removed all her household goods out of the house. She went and reported at the Assistant Chief PW2. She did not go back to the house. The Assistant Chief tried to reconcile them. The appellants however proceeded to pull down the wall to the house and the windows. She stayed away from the house until the 27/2/09 when she went back to plough her Shamba. While she was doing so, the 2nd appellant went there and cut her with a panga on the left palm. He boxed her right eye. By then the 1st appellant was talking to the people who had come to plough the land. The complainant went and reported to the Assistant chief. She was treated at Iguhu Health Centre. She reported the matter at Kakamega Police Station. The appellants were arrested and charged with the offence.

4. The Assistant Chief PW2 testified that the complainant's husband is deceased. That on the 27/2/09 at 8 am he was home when the appellants and the complainant went to him. The complainant was bleeding from her hand. The 2nd respondent reported to him that he had been attacked by the complainant and some people whom she had hired to plough her shamba. The complainant reported to him that the appellants had assaulted her. He advised the complainant to go for treatment. The appellants went to report at Kakamega Police Station .He did not believe their story as they had no injuries on them. He followed them to the Police Station. He found them having reported that they had been assaulted. He reported to the Police officer who was taking their report that the appellants had assaulted the complainant and that they had also damaged her house. The appellants were then arrested.

5. Mathias Ekoli PW3 told the court that on the 27/4/09 she had been hired by the complainant to plough her land. That he was ploughing the shamba when the appellants came out of their houses while armed with pangas. The complainant was present there. They ordered him to stop the work. As he urged with them, the 2nd appellant cut the complainant with a panga after she asked him why he was blocking PW3 from ploughing the shamba. The 2nd appellant then left the space.

6. PC David Otieno Ouma PW4 of Kakamega Police Station testified that he went to the scene on 20/4/2009 and took photographs of a damaged house. He produced the photographs in court as exhibits – PEX-1 (a) – (c).

7. A Clinical Officer at Kakamega Provincial General Hospital PW5 testified that the complainant went to their hospital and presented a history that she had been assaulted by people known to her . She had bruises on the right cheek and a swollen neck. She also had a cut wound on the left index finger. The injuries were 3 days old at the time she was seen at the hospital. The clinical officer completed a P3 form for her. He produced it in court as exhibit, PEX 2.

8. PC Denis Maingi PW6 of Kakamega Police Station stated in his evidence that on the 27/2/09 at 12.30 pm he was at the station report office with a colleague Boniface Tanui when PW2 (Assistant Chief) went there and reported that the complainant in the case had been assaulted and her house demolished by her step sons. That he, Pw6, booked the report and referred him to the crime office. That after about 20 minutes the appellants went there and booked a report. The assistant chief found them there and reported that they are the ones who had assaulted the complainant. The police officer then arrested them. The case was investigated by another police officer. The appellants were then charged.

9. When placed to their defence each of the appellants opted to give unsworn statement. The 1st appellant stated that on the 14/2/09 he and his family were expecting some visitors who were coming to pay dowry to his family. At 6 am he and the 2nd appellant went to the assistant chief PW2 and reported to him. They returned home. Their visitors later came. They hosted them upto 5 pm when they left.

10. That on the 27/2/09 at 6 am he was leaving his home heading to work when he heard noise from his home. He rushed back and found the 2nd appellant fighting with Mathias PW3. He separated then. PW3 was armed with a panga. As he separated them the complainant came and held the panga from PW3 by the sharp end and she was cut by the panga. He went and reported the matter to the Assistant Chief and then to the police. They went to Kakamega General Hospital for the 2nd appellant to be treated. They went back to the police station. They found the assistant chief there. He ordered for their arrest. They were arrested and locked up. They were later charged.

11. The 2nd appellant stated in his statement that on the 27/2/09 at 6 am he was at his homestead when he saw Mathias PW3 and another person ploughing their plot. He edged closer to Mathias and enquired who had employed him to till the plot. Mathias was armed with a panga and became hostile to him. Mathias pushed him and he fell down. He sat on him. He screamed for help. He heard the 1st appellant trying to separate Mathias from him. He heard the complainant shouting 'Mpige Kabisa'. He managed to escape. The complainant threw a stone at him while alleging that he had cut her hand. He and the 1st appellant went and reported to the Assistant chief who sent them away. They reported at Kakamega Police Station. They were referred for treatment. He was treated at Kakamega Provincial General Hospital. He went back to the Police Station. Policemen snatched away his treatment document. They found the Assistant Chief at the police station who said that he, the appellant, had injured somebody from his area. He was arrested.

12. That on the 14/2/17 his family was expecting some visitors. That at 7 am he went to the Assistant Chief with the 1st appellant to obtain a permit. He went back and hosted the visitors upto 4.30 pm when they left. On the following day he went back to the Assistant Chief to give him a report. They found him and gave him a receipt of the cows that their visitors had brought as dowry. The assistant chief demander for Kshs 1000/- but he told him that he had no money. The Assistant chief gave him one receipt for one cow and refused to issue a receipt for the other cow until when they paid the money.

Findings by the trial court:-

13. The trial magistrate found that the charge of assault against the 2nd appellant was proved beyond reasonable doubt . That the evidence of the complainant that the 2nd appellant cut her with a panga was corroborated by the person she had hired to plough her land PW3. That the injuries were corroborated by the findings of the clinical officer who examined her at the hospital. Further that the 2nd appellant did not challenge the complainant in cross examination that he cut her with a panga.

14. On the charge of malicious damage to property, the trial magistrate found that the complainant's house was demolished which evidence was corroborated by the Assistant chief Pw2. That the appellants admitted before an elders meeting that they are the ones who demolished the house. That they agreed to repair the house within one week but reneged on the agreement. That the appellants did not deny having been summoned by the Assistant chief PW2 and elders for a meeting in which they agreed to repair the house. That they did not controvert this evidence and the magistrate came to the conclusion that they are the ones who demolished the house.

Submissions:

15. The advocates for the appellants, **S.B.A Mukabwa & Co. Advocates**, submitted that the trial magistrate did not comply with section 211 of the Criminal Procedure Code upon placing the appellants to their defence. That the omission rendered the proceedings incompetent as held in the case of **Wanjiku Vs Republic (2002) 1KLR** That the trial magistrate failed to consider vital conflicts in the prosecution evidence. That the complainant alleged that the 2nd appellant cut her on the left palm with a panga and boxed her on the right eye but that the clinical officer PW5 observed bruises on the right cheek, a swollen neck and a cut wound on the left index fingers which injuries were not mentioned by the complainant in her evidence. That the clinical officer did not mention the injury on the right eye and left palm.

16. The advocates pointed out that the complainant alleged that she is the one who reported the case to the police but PC Maingi PW6 stated that it is the Assistant Chief PW2 who reported the matter to the police. More so that the investigating officer did not testify in the case which tended to weaken the prosecution case.

17. Further that the complainant stated that she ran away when the appellants attacked her house. She did not state that she saw the people who were damaging her house. Nobody was called to support her evidence that it is the appellants who demolished the house. The advocates submitted that the trial court wrongly relied on the evidence amounting to a confession that the appellants agreed to repair the house without the safe guards of taking a confession as provided by section 25 A of the Evidence Act Cap Laws of Kenya.

That the burden of proof in a Criminal trial rests upon the prosecution throughout the trial – **Oketh Okale Vs Republic (1965) E.A 555**. That in this case the trial court shifted the burden to the appellants as demonstrated by the following passages in the judgment.

> Page 18 – The second accused failed to cross- examine the complainant on the basis of her said evidence of how he actually assaulted her with a panga.
>
> Page 20- The accused never challenged this evidence in cross examination in their cross examination of PW1 , 2 and Pw3 …and having failed to controvert this evidence I do have no option but to find that they are the ones who willingly and maliciously destroyed and/or demolishedthe complainant's house.

18. The advocates submitted that these statements amounted to shifting the burden of proof to the appellants which occasioned the appellants a miscarriage of justice.

The advocates further submitted that the learned trial magistrate ignored the appellants' defence and only considered the evidence of the prosecution witnesses which occasioned miscarriage of justice to the appellants.

19. It was also submitted that the sentences imposed on the appellants were illegal. That section 28(2) of the penal code imposes a default sentence of 6 months for a fine of Kshs 20,000/- and not three years as imposed by the trial court .

In view of the above the advocates urged the court to set aside the convictions and the sentences imposed on the appellants and set them at liberty.

20. The prosecution counsel **Mr. Ng'etich** opposed the appeal and relied on the decision of the trial court.

DETERMINATION

21. This is a first appeal. It is the duty of a first appellate court to examine and analyse the evidence adduced at the lower court and draw its own conclusions while at the same time making due allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses – see **Kiilu & Another Vs Republic** (2005) IKLR 174.

1. The questions that are before the court are:

    1) Whether there was evidence that the 2nd appellant assaulted the complainant; and

    2) Whether there was evidence that the appellants maliciously damaged the complainant's house.

The court record indicates that at the close of the prosecution case the court considered the evidence adduced by the prosecution witnesses and found that a prima facie case had been made out against the appellants. The appellants were accordingly placed to their defence. The court then reminded the appellants of the charges and explained their rights under section 211 of the Criminal Procedure Code. The appellants then opted to give unsworn statements and call no witnesses. It is therefore incorrect for the advocates for the appellants to submit that the provisions of section 211 of the CPC were not complied with.

The contention that the appellants had no case to answer was unsubstantiated. I find that there was sufficient evidence to warrant placing the appellants to their defence.

22. The Police Officer who investigated the case did not testify as he was said to have been transferred to Nyeri. PC Maingi PW6 who arrested the appellants did however testify. The report was made to him. The crucial evidence in the case was given by the witnesses who testified. It has not been shown that crucial evidence was left out by the failure of the investigating officer to testify in the case.

23. On the question of conviction of assault against the 2nd appellant, the 2nd appellant's advocate took issue on the contradictions between the evidence of the complainant and the medical findings. The complainant stated that the 2nd appellant cut her on the left palm and boxed

her right eye but these injuries were not supported by the clinical officer PW4 who found quite different injuries on the complainant on the right cheek, swollen neck and cut wound on the left index finger. The advocates submitted that the complainant did not mention these injuries. The question then is whether the complainant received the injuries complained of.

24. The 1st appellant in his defence confirmed that the complainant was cut by a panga on the hand though he claimed that it was accidental. This therefore proves that the complainant was indeed cut by a panga on the hand. The fact that the complainant said that she was boxed on the right eye does not contradict the findings by the clinical officer that the injuries were on the right cheek. The right eye is just next to the right cheek. It was a question of describing where the complainant was hit. Similarly the left index finger originates from the left palm. It was again a difference in description where the complainant was cut. Such discrepancies are expected in the evidence of witnesses.

25. It is not every contradiction in the evidence of the prosecution evidence that should lead to the evidence being rejected. In ***Philip Nzaka Watu – Vs Republic*** (2016) eKLR, the *Court of Appeal held that:*

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconstancies in question"- see Jackson Mwanzia Musembi Vs Republic (2017)eKLR.***

The contradictions herein were minor and tended to signify veracity and honesty rather than deliberate untruthfulness. The discrepancies did not go to the substance of the charge.

25. The evidence that 2nd appellant cut the complainant on the left hand with a panga was corroborated by the ploughman PW3. The clinical officer PW4 confirmed the injury and the classified the degree of injury as harm. I am of the considered view that the trial magistrate was correct in finding that the 2nd appellant had assaulted the complainant and occasioned her actual bodily harm. The appeal by the 2nd appellant against conviction on count 1 is thereby dismissed.

26. In respect to the charge of malicious damage to property, the complainant did not state how she came to know that the people who were damaging her house were appellants. She did not state whether or not she saw the people. The court did not make an enquiry on the issue. The complainant stated that the house was damaged at 6 am. She was sleeping at the time the people came and started to damage the house. The court takes judicial notice that there are times in the year when it is dark at 6 am. It seems from the evidence that the complainant only heard some people breaking the rear doors to her house and she then escaped. How she knew that the people were the appellants was not explained. Nobody was called who saw the appellants demolishing the house. There was there by no evidence that the people who damaged the house were the appellants.1. The trial party based its conviction on the appellants on a confession that they admitted before a meeting of elders convened by the Assistant Chief that they are the ones who demolished the house. A confession under section 25 of the Evidence Act, cap 80 Laws of Kenya is defined as follows:

> "25. ***A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."***

27. However the confession made by the appellants before the council of elders was not admissible as evidence in court against the appellants by virtue of the Provisions of section 25A(1)of the Evidence Act which states that :-

> "25A. *(1)* ***A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of police, and a third party of the person's choice."***

The confession was not made before the above named persons. It was therefore a misdirection on the part of the trial court to rely on a confession that was not properly taken to form the basis of the conviction on the appellants.

28. The onus of proving a charge against an accused person in a criminal trial rests on the prosecution throughout the trial. It does not shift to the accused. It is apparent from the comments enumerated above that the trial court in this case shifted this burden to the appellants as far as count 2 was concerned. This again was a misdirection on the part of the trial magistrate. I therefore find that the charge of malicious damage to property had not been proved against the two appellants.

29. In the foregoing the charge of assault on the 2nd appellant in count I was proved beyond reasonable and the conviction is thereby affirmed. The 2nd appellant was sentenced to a fine of Kshs. 20,000/= in default to serve a jail term of 3 years. The complainant in the case hand sustained a cut on the index finger. I find that a fine of Kshs. 20,000/= was not excessive.

35. Section 28(2) of the Penal Code fixes the maximum period that an accused person may be sentenced for failure to pay a fine of Kshs. 20,0000/= at 6 months. The trial court in this case imposed a default period of 3 years. It was therefore illegal for the trial court to impose a default period of years. The default sentence of 3 years is set aside and substituted with one of 4 months imprisonment.

36. The charge of malicious damage to property in count 2 was not proved beyond reasonable doubt. The conviction and the sentence imposed on the 2 appellants in count 2 is thereby quashed and set aside. If there was any fine paid in respect to count 2, the same is ordered

to be returned to the appellants.

Delivered, Dated and signed at Kakamega this 18th day of July, 2018.

J.NJAGI

JUDGE

In the presence of :

No appearance.....1st &2nd appellants

Juma.....for respondent/state

George .....court assistant

Appellants.....Absent